PART X

PROVISIONAL AND PROTECTIVE MEASURES

INTRODUCTION

1. This Part concerns provisional and protective measures, which are important both in domestic and cross-border litigation to secure effective enforcement or to otherwise preserve rights and prevent (further) harm prior to the commencement of proceedings or pending final judgment (also see Rule 67). It consists of three Parts: a General Part (Section 1), which includes rules that apply to all types of measures, unless otherwise provided; a Special Part (Section 2), which includes rules on Asset Preservation, Regulatory Measures, Evidence Preservation and Interim Payments; and, a Cross-Border Part (Section 3), which primarily refers to existing legislation. Section 3 further provides a minimal number of general rules as it is not intended to provide a set of rules on the complex and multifaceted issue of cross-border provisional and protective measures.

2. Principle 8 of the ALI/UNIDROIT Principles was the starting point for the development of Rules concerning provisional and protective measures. This Principle includes three basic rules: on function and proportionality (8.1); *ex parte* measures; (8.2); and compensation and security (8.3). National approaches taken in European jurisdictions were then considered as the general approach to, and types of, provisional and protective measures, their scope, and the requirements for granting them differ substantially across them. Additionally, a number of specific EU instruments, such as the EAPO Regulation, the IP Enforcement Directive, and the case law on provisional and protective measures under the Brussels Ibis Regulation, were considered. Finally, a number of other important sources of soft law that were considered include the UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006 (Articles 17-17G),[1] the 1996 ILA Principles on Provisional and Protective Measures in International Litigation (Helsinki Principles),[2] and the Storme Report (Article 10).

3. To bridge the differences between differing European traditions this Part takes a functional approach, as is clear from Rule 184. Where appropriate, diverging approaches have been accommodated by including different options. This is, for instance, clear in Rule 191 where different types of sanctions are incorporated, by reference to the general rule on sanctions (Rule 27) that have the common goal of providing an effective enforcement mechanism. In other rules, such as Rule 188, flexibility is created to facilitate tailor-made solutions for the specific situation given the wide variety of provisional and protective measures. A consequence of this approach is that

1 See <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>.

2 J. Crawford and M. Byers (eds.), The International Law Association. Report of the sixty-seventh Conference held at Helsinki, Finland 12 to 17 August 1996, London: Cambrian Printers 1996. F.K. Juenger, The ILA Principles on Provisional and Protective Measures, 45 AJCL 1997, pp. 941–944, reproducing the Principles.

not all types of measures covered by these Rules exist in all European countries, while others are only available in a limited number of countries, e.g., evidence preservation measures and interim payments.

4. The Rules in this Part are drafted so as to balance the interest of the applicant in safeguarding their rights and the interest of the respondent to minimise the risk that any such measures cause unjustifiable harm. This aim is further articulated through the principle of proportionality, set out in Rule 185, which provides a particular application of the general proportionality principle (Rules 5(1) and 6).

SECTION 1 – GENERAL PART

Rule 184. Provisional and Protective Measures

(1) A provisional or protective measure is any temporary order that has one or more of the following functions:
- **(a) to ensure or promote effective enforcement of final decisions concerning the substance of the proceedings, whether or not the underlying claim is pecuniary, including securing assets and obtaining or preserving information concerning a debtor and his assets; or**
- **(b) to preserve the opportunity for a complete and satisfactory determination of the proceedings, including securing evidence relevant to the merits or preventing its destruction or concealment; or**
- **(c) to preserve the existence and value of goods or other assets which form or will form the subject-matter of proceedings (pending or otherwise); or**
- **(d) to prevent harm from being suffered, to prevent further harm, or to regulate disputed issues, pending final judgment.**

(2) A provisional or protective measure ordered should be suitable for its purpose.

Sources:
ALI/Unidroit Principle 8.1.

Comments:
1. Rule 184 describes the different functions of provisional and protective measures in these Rules. A provisional or protective measure is a temporary measure given by the court. Its temporary nature is inherent in provisional and protective measures, which will cease to have any effect, at the latest, when final judgment has been delivered. There is no requirement for proceedings to have been commenced (Rule 52) prior to an application for a provisional or protective measure to have been initiated, although Rule 188 imposes an obligation on an applicant to commence proceedings within a specified period of time or a period set by the court. It is, however, inherent in the aim of such measures that they can only properly be granted, either before the commencement of proceedings or during their pendency, if it is necessary to do so. With the exception of the special provision for interim payments under Rule 200, urgency is not a specific requirement.
2. Different terminology is used across Europe for provisional and protective measures, e.g., provisional relief, preliminary measures, preservation measures, interim relief and interim orders. The use of 'provisional and protective measures' as generic terminology to denote these variously described measures all of which serve the functions enumerated in this

Part, can, however, be traced back to the 1968 Brussels Convention.[3] As a consequence it is well-established in European law and, for that reason, adopted here.

3. A wide variety of provisional and protective measures exists in the laws and practice of European jurisdictions. Rather than giving a strict definition of what these measures entail, this Rule describes the various functions that they fulfil. In comparative procedural law doctrine, including in Article 10.1 of the Storme Report, provisional and protective measures have been divided into three broad types. First, conservatory or preservation measures to secure enforcement on the merits. Secondly, regulatory measures that cover a broad range of measures intended to maintain, what is typically referred to as, the *status quo* or to make a provisional arrangement between parties, e.g., measures requiring a party to perform or to abstain from carrying out certain acts. Thirdly, anticipatory measures that can, on a provisional and temporary basis, award either partially or in full what is or will be claimed in the proceedings. A particular example of this type of measure is an order for an interim payment (Rule 200).
4. The four categories of measure enumerated in this Rule elaborate the functions, including the preservation of evidence, they can fulfil. The Rule is intended to provide the court with the power to ensure that the applicant's interests are capable of being protected until the substantive proceedings are concluded. The first category includes measures that promote or secure the enforcement of a judgment, and typically cover, but are not limited to, asset preservation measures. The second category comprises measures that are aimed at preserving the court's ability to determine the proceedings in a complete and satisfactory manner. It includes measures to secure evidence relevant to the proceedings. The third category encompasses measures designed to preserve the existence and value of goods or other assets that are or will form the subject-matter of pending or intended proceedings. These include, but are not limited to, orders to ensure the safe custody of assets, to ensure that income is generated from assets, or to require the sale of perishable goods. The fourth category contains measures aimed at preventing harm, or further harm, to the applicant pending a final judgment. These include measures requiring interim performance, e.g., the provision of goods, providing access to premises, maintaining contractual performance, as well as restraining orders, e.g., in respect of intellectual property disputes, and interim payments.
5. The grant of any particular provisional or protective measure should only be made if, and in so far as it is, an appropriate means of achieving the purpose of the application made (Rule 184(2)). Any such measure granted must also be a proportionate means to achieve its objective (Rule 185). Additionally, any specific measure can fulfil more than one objective.
6. Provisional or protective measures granted under this Part do not include, nor should they be used as, a summary procedure to finally determine all or part of the dispute (see Rule 65 with comments 1 to 3). Nor do they have any *res judicata* effect in respect of the substantive proceedings.

Rule 185. Proportionality of provisional and protective measures

(1) A provisional and protective measure should impose the least burden on the respondent.

3 Art. 24.

(2) The court must ensure that the measure's effects are not disproportionate to the interests it is asked to protect.

Sources:

ALI/Unidroit Principles 5.8 and 8.1.

Comments:

1. This Rule provides that the grant of provisional and protective measures is subject to the principle of proportionality, whilst taking into account the interests of both the applicant and the respondent. This is derived from both ALI/Unidroit Principle 5.8 (*ex parte* orders) and Principle 8.1 (provisional measures). The former issue is further regulated by Rule 186(2). Additionally, the principle of proportionality is inherent in the law and practice on provisional and protective measures in the European jurisdictions.
2. The principle of proportionality is particularly important in assessing provisional and protective measures. This is all the more pertinent where without-notice (*ex parte*) measures are concerned (Rule 186). This is because the various procedures for obtaining them, and the required urgency involved in doing so, will often not enable a full assessment of the law and the facts in dispute, a point which is all the more apposite where the application is without-notice.
3. While Rule 184(2) requires that the court must grant such provisional or protective measures it concludes is necessary and suitable for its purpose, it must also ensure that the measure ordered imposes the least burden on the respondent and that its effects are not disproportionate to the applicant's interests. As such the court could, for instance, limit the scope or the time period of the measure or set other conditions which limit its adverse effect upon the respondent.
4. While the general burden of proof is a matter of substantive law (see Rule 25(2)), the burden of proof concerning applications for provisional and protective measures is generally placed upon the applicant. Where, however, a respondent alleges that potential negative consequences are likely to arise from the grant of such a measure, and over which the applicant cannot have any knowledge, the burden of proof will lie upon them (Rules 193, 197, 199, and 201).

Rule 186. Without-notice (Ex parte) *procedure*

(1) The court may order a provisional or protective measure without-notice ('*ex parte*') only if, in the circumstances, proceedings with-notice ('*inter partes*') would frustrate the prospect of the applicant receiving effective protection of their interests.

(2) When granting an order without-notice the court must give the respondent an opportunity to be heard at the earliest possible time, that date to be specified in the order that was made without-notice. The respondent should be given notice of the order and of all the matters relied upon before the court to support it as soon as possible.

(3) An applicant must fully disclose to the court all facts and legal issues relevant to the court's decision whether to grant relief and, if so, on what terms.

(4) The court must make a prompt decision concerning any objection to the grant of a provisional or protective measure or its terms.

Sources:

ALI/Unidroit Principles 8.2 and 5.8.

Comments:

1. The grant of a provisional or protective measure ought preferably to take place at a hearing where the respondent is present, i.e., at a with-notice (*inter partes*) hearing. This enables their procedural rights to be secured. It also promotes procedural proportionality as it reduces the number of hearings required to decide the matter. There are circumstances, however, where it is necessary to determine and grant such a measure in the absence of the respondent and, moreover, in the absence of notification to them. This is the case where notice is likely to frustrate the purpose for which the order is sought, and hence secrecy is needed, i.e., where the respondent, having advance notice of the application, is expected to frustrate an order protecting the applicant's financial interests by disposing of assets before an asset preservation order is made. Additionally, there may be circumstances where urgency entails that notice cannot be given.
2. In most procedural systems and particularly in relation to certain protective measures, such as asset preservation orders, the grant of such measures on a without-notice (*ex parte*) basis is commonly permitted. This is, for instance, the general rule under Article 11 of the EAPO Regulation, and equally in respect of intellectual property infringements, it is set out in Article 8 of the IP Enforcement Directive. This Rule is, however, particularly inspired by ALI/Unidroit Principles 8.2 (provisional and protective measures) and 5.8 (general *ex parte* proceedings), as well as Articles 17B and C(2) of the UNCITRAL Model Law.
3. The Rule requires the court to set a time within which the respondent shall be heard in respect of the measure where it was initially granted on a without-notice (*ex parte*) basis. This is to ensure that the respondent can properly exercise their right to be heard (Rules 11 and 12) and to have the matter considered in the light of a full consideration of the facts and law. To best secure the respondent's rights, a with-notice (*inter partes*) hearing should take place at the earliest possible time after the without-notice (*ex parte*) hearing. The date of the with-notice hearing must be specified in the order in accordance with Rule 186(2).This latter requirement is intended to ensure that, in the absence of such a date being set within the order made on a without-notice (*ex parte*) basis, the order does not become a *de facto* final order. It is thus intended to secure the respondent's procedural rights, particularly their right to be heard. In addition to the protection afforded to respondent's by Rule 186(2), Rule 189 enables the court to review the measure, ordinarily at the respondent's request, whereas under Rule 190 the respondent is liable if a provisional or protective measure is set aside, lapses, or if the claim is dismissed in the proceedings on the substance.
4. The Rule does not provide a set time period within which a with-notice (*inter partes*) hearing has to take place. This is both because different European jurisdictions take different approaches to the provision of timescales, and because there is need to provide the court with the flexibility to determine an appropriate date in the light of all the circumstances of the particular case. To this end the respondent must be notified of the measure immediately after it is granted. Notice includes providing both the order and any documents relied on to support the application to the respondent. A with-notice (*inter partes*) hearing will be conducted so that the court considers the application *de novo*, i.e., it considers the grant of the measure afresh and not as a review of the without-notice (*ex parte*) order.
5. On a without-notice (*ex parte*) application, consistently with the principle of proportionality, in order to protect the respondent's rights, and to enable the court to assess whether relief should be granted, applicants are required to fully disclose relevant factual and legal matters (Rule 186(3)). A similar rule is set out in Article 17F of the UNCITRAL Model

Law. Where appropriate, an applicant at a without-notice (*ex parte*) hearing should also disclose any probable defences the respondent may have, including the existence of any potential limitation defence (time-bar), or any possible right of set-off. This enables the court to make a preliminary assessment of the respondent's interests.

6. Rule 186(4) is inspired by Article 17C of the UNCITRAL Model Law. It is intended to afford the parties protection from court delay.
7. The ability to grant a provisional or protective measure on a without-notice (*ex parte*) basis is not permissible in respect of interim payments (Rule 201(3)).

Rule 187. Security

(1) When assessing whether to grant or continue a provisional or protective measure the court may consider whether security can be provided by the respondent in lieu of the order.

(2) As a condition of granting or continuing a provisional or protective measure the applicant may, depending on the circumstances, be required to provide appropriate security.

(3) Security must not be required solely on the basis that the applicant or respondent is not a national or resident of the forum State.

Sources:

ALI/Unidroit Principle 3.3.

Comments:

1. Rule 187 provides the basis to make the grant of a provisional or protective measure subject to the provision of security. Security may, for instance, be a bank guarantee, a guarantee by a non-party or any other type of guarantee that provides effective security (Rule 187(1)). It may also be such as to secure any payment that may become due from the applicant to the respondent, i.e., as damages for the wrongful grant of a protective measure (Rule 187(2)). In the latter case, security may also take the form of a formal undertaking to be made to the court.
2. Rule 187(1) concerns the situation where a respondent can offer security before or after a provisional or protective measure has been granted. If the respondent offers sufficient security to protect the applicant's interests, it will not be necessary to grant such an order, or an order granted already may be discontinued. Where an order has already been made, Rule 189 enables the respondent to request that the court modify, suspend, or terminate it. Also see Rule 184(2) and Rule 185 regarding the effect of a respondent giving sufficient security.
3. Rule 187(2) provides that security may be required as a condition for the court to grant the measure requested by an applicant. It is consistent with the aim of ensuring that such a measure is only ever provisional, and provides support for the liability provision set out in Rule 190. The provision of security may be of particular importance where an order to perform or refrain from performing an action is ordered under Rule 196 or an interim payment is ordered under Rule 200. It is not, however, limited to such situations. This particular Rule was drawn from Article 17E of the UNCITRAL Model Law. A similar provision can also be found in Article 9(6) of the IP Enforcement Directive.
4. While, for instance, Article 12 of the EAPO Regulation makes an order for security compulsory, in order to prevent abuse of the procedure and to ensure compensation for any damage suffered consequent to the procedure by the debtor, the present Rule is discretionary. This enables the court to determine on the individual merits of each application

whether such security is necessary. It also ensures that the question of security does not, where a respondent is unable to provide it, provide an absolute bar to an award of a provisional or protective measure.

5. In determining the nature or amount of appropriate security the court should take account of the potential harm that may be suffered by a respondent should the substantive claim be unsuccessful or the measure granted be varied, modified or set aside (Rule 187(2), and see Rule 190).
6. Rule 187(2) incorporates the non-discrimination principle that is part of European Union law, and is also set out in ALI/Unidroit Principle 3.3 Nationals, residents, non-nationals and non-residents should be treated equally.

Rule 188. Initiation of Proceedings

(1) Where the applicant has been granted a provisional or protective measure before initiating proceedings under Rules 21(1), 53, such proceedings must be initiated before the date set by the court. Where the court does not set such a date or it is not otherwise specified by the applicable law, the applicant shall initiate such proceedings within two weeks of the date of the issue of the decision granting the remedy. The court can extend the period on the request of a party.

(2) If proceedings have not been initiated as required by Rule 188(1), the measure shall lapse, unless the court provides otherwise.

Sources:

ALI/Unidroit Principle 8.

Comments:

1. European jurisdictions differ substantially when it comes to the obligation to initiate proceedings where provisional or protective measures are sought before they have commenced. In some countries there is a general obligation to commence proceedings (for instance, Italy, Spain, and Romania). In other countries there is, as is the case in ALI/Unidroit Principle 8, no such obligation (for instance, France, Germany, and the Netherlands). Where protective measures are conservatory, the general approach is to impose an obligation on the party obtaining the benefit of it to commence proceedings. This is the case as such measures are ordinarily granted without-notice (*ex parte*) and are intended to protect enforcement in the event of success in respect of the substantive dispute between the parties. The obligation to commence proceedings is also present in Article 10 of the EAPO Regulation, where attachment of bank accounts is concerned. Also see the obligation to commence proceedings in respect of intellectual property infringement cases (Article 50(6) of the TRIPS Agreement[4] and Article 9(5) of the IP Enforcement Directive.
2. Rule 188 diverges from the position adopted in the ALI/Unidroit Principles. It adopts the approach that an applicant who is granted a provisional or protective measure prior to commencing proceedings against the respondent should, unless the court orders otherwise, be required to do so. This approach is taken to ensure that protective and provisional measures do not, by default, become in effect final. It is thus intended to ensure that the substantive dispute is determined by the court consistently with the right to fair trial, i.e., both parties' right to receive a fair process is given effect. Parties may decide to settle their

4 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Trade-Related Aspects of Intellectual Property Rights.

dispute on the basis of the decision reached in an application for a provisional or protective measure. They may agree that such a decision be rendered enforceable by the court (see Rules 9(3), 141, Article 59 Brussels Ibis Regulation) or, e.g., be authenticated by a notary to become enforceable (see Article 58 Brussels Ibis Regulation and equal provisions of national law). A variety of national legal practice has developed in European jurisdictions in which contractual clauses, including enforceable contractual penalties, to punish and deter wrongdoing, replace, in part, the function of final court judgments being *res judicata* and enforceable.

3. Different approaches are taken by different international instruments to the time period within which an applicant is required to initiate proceedings following the grant of a provisional or protective measure. Article 10 of the EAPO Regulation prescribes a period of maximum 30 days after lodging the application or 14 days after the issue of the order, whichever date is the later. Article 9(5) of the IP Enforcement Directive and Article 50(6) of the TRIPS Agreement provide that the measure ceases to have effect if proceedings are not initiated within a reasonable period, which is to be determined by the judge, or in the absence of such a determination, a maximum of 20 working days or 31 calendar days after the grant of the measure, whichever is the longer. The EAPO Regulation explicitly provides that the period may be extended at the debtor's request, for example to pursue a settlement.
4. Rule 188(1) adopts the same approach as that taken by those international instruments. It provides that when a measure is granted, the applicant has 14 days to commence proceedings. As such it adopts the same approach as that set out in the EAPO Regulation. That default period may be varied by the court when granting the order, or at a later date upon the request of either party. This enables both the court and the parties to take steps to vary the time period within which proceedings must be commenced to, for instance, enable negotiations to take place. It thus enables the parties to take steps to avoid incurring the cost of commencement, where that is unnecessary. Providing a default period requiring proceedings to be commenced, in the absence of which the measure lapses unless the court orders otherwise, ensures (as noted above) that the measure does not become a *de facto* final determination of the dispute, and equally protects the parties' procedural rights.
5. Rule 188(2) provides the default rule that the provisional or protective measure shall lapse if proceedings are initiated in accordance with Rule 188(1) and Rule 21(1). However, to accommodate situations and systems where such effect is not considered desirable, the court can provide otherwise.

Rule 189. Review and Appeal

(1) The court may, either on application of a party or on its own motion, modify, suspend, or terminate a provisional or protective measure if satisfied that a change in circumstances so requires.

(2) Decisions that grant, deny, modify, suspend or terminate provisional or protective measures are subject to appeal. Rule 179(3) applies accordingly.

Sources:

ALI/Unidroit Principles 10.1 and 10.3.

Comments:

1. Rule 189(1) makes provision for the court to review, amend, suspend or terminate a provisional measure. It is a provision which is common in many European jurisdictions.

It enables the court to modify its order to take account of a change in circumstances, while enabling a respondent subject to such an order to protect their interests. Any such review must be carried out consistently with the principle of proportionality (Rules 5 and 185).

2. A review under this Rule would ordinarily be carried out, on-notice to the applicant, following a request from the respondent, the court, however may do so of its own motion (*ex officio*) where that is necessary (compare Rule 21, which applies to the institution of proceedings by the court and not review by the court of its own orders). While this may generally be considered to run against the principle of party autonomy and party initiative in civil and commercial cases, in exceptional cases where third-party interests (for instance those of shareholders) or the public interest requires it, the court may modify, suspend, or terminate a provisional or protective measure on its own motion (*ex officio*). This approach is consistent with that taken in Article 17D of the UNCITRAL Model Law, but also see the, partially, differing provision in Article 33 of the EAPO Regulation.
3. Rule 189(2) allows an appeal from a decision granting or refusing a provisional or protective measure as well as against decisions according to Rule 189(1). Where there is, however, a change of circumstance underlying the provisional or protective measures, parties must first apply for a review according to Rule 189(1); they cannot apply directly to the higher court.

Rule 190. Applicant Liability

(1) If a provisional or protective measure is set aside, lapses, or if the proceedings are dismissed on procedural grounds or on their merits, the applicant must compensate the respondent for such loss or damage caused by the measure.

(2) The applicant is liable to compensate non-parties for any damages, and expenditure incurred as a consequence of complying with the measure.

Sources:

ALI/Unidroit Principle 8.3.

Comments:

1. Rule 190 concerns the applicant's liability for damages caused to the respondent or non-parties affected by the measure. While many countries have specific rules on applicant liability in their rules on civil procedure or use the general rules on tort liability to reach similar results, this Rule, and particularly Rule 190(1) was inspired by ALI/Unidroit Principle 8.3. Similar rules are included in Article 13 of the EAPO Regulation, Article 9(7) of the IP Enforcement Directive, and Article 17G of the UNCITRAL Model Law. It should be noted, however, that Article 13(5) of the EAPO Regulation expressly provides that it does not deal with the question of possible liability towards any non-party. This Rule does so, given the general ability these Rules provide for protective or provisional measures to be applied to non-parties. As such, this Rule seeks to provide all those, whether respondent or non-party, with sufficient protection via the application of the compensatory principle it articulates. While some contributions discussing this provision criticised the potential high risk to applicants that they may be liable for unforeseeable significant damages, which could therefore deter applications for provisional measures, the majority stressed the necessity of not transferring the risk of provisional justice to non-parties that have no or no real influence on the development of the conflict between the parties.

2. Rule 190(1) deals with the situation where the measure is set aside, lapses (in particular when the applicant did not initiate substantive proceedings in accordance with Rule 188 and Rule 21(1)) or the substantive proceedings are dismissed either on procedural grounds or on the merits.
3. Rule 190(1) requires an applicant to compensate the respondent for loss and damage caused by the measure on a strict liability basis. This includes loss and damage directly resulting from the measure, for instance not being able to utilise goods or sell products, as well as legal costs and expenses incurred during proceedings (also see Rule 187(2)). In determining the extent of any compensatory damages, consideration should be given to the extent to which the applicant succeeded in their substantive claim, i.e., if they succeeded in part that may need to be reflected in the quantum of damages.
4. Rule 190(2) concerns damage caused to or expenses incurred by non-parties as a consequence of their compliance with a provisional or protective measure. It is not limited to the cases where the measure is set aside, lapses or where the proceedings are dismissed. Such compensation will usually relate to expenses made in implementing the measure, for instance administrative steps necessary to comply with it. However, other expenditure incurred as a consequence of compliance may have to be compensated by the applicant.

Rule 191. Sanctions for non-compliance

Except in respect of interim payments, where there is non-compliance with a provisional or protective measure the court may impose a sanction under Rule 27, as appropriate.

Sources:
ALI/Unidroit Principle 17.

Comments:
1. Rule 191 makes it clear that the general power to impose sanctions for non-compliance with these Rules, applies to non-compliance with provisional and protective measures, with the exception of interim payment orders.
2. The appropriate sanction will be included in the order upon the request of the applicant. The sanction, which should be proportionate to the non-compliance (Rule 185) should be an effective means to secure its aim.

SECTION 2 – SPECIAL PART

A. ASSET PRESERVATION

Rule 192. Types of Asset Preservation Measure

A court may grant, on application by a party, any of the following asset preservation orders for the purpose of protecting their claim:

(a) an attachment order, which is an order authorising provisional attachment of the respondent's assets,

(b) an asset restraining order, which is an interim order preventing the respondent from disposing of, or dealing with, their assets, or

(c) **a custodial order, which is an order that the respondent's assets shall be placed in the custody of a neutral non-party (a custodian).**

Sources:
ALI/Unidroit Principle 8.1.

Comments:
1. This Rule was inspired by Article 1 of the EAPO Regulation and Article 17.2(c) of the UNCITRAL Model Law. Orders made under Rules 192(a) and (b) would normally be granted on a without-notice (*ex parte*) basis, as advance notice of the order would be expected to frustrate its purpose (see Rule 186).
2. Rules 192(a) and (b) operate differently. Attachment orders under the former Rule confer rights on applicants with respect to assets, whereas assets restraining orders under the latter Rule impose a duty on the respondent not to dispose of, or deal with, the assets subject to the order.
3. Asset preservation orders are intended to protect the substance of an applicant's claim for relief in proceedings. It follows from Rule 188(2) and Rule 21(1) that an order will cease to have effect where an applicant fails to commence such proceedings within the prescribed time.
4. In Rule 192, the term 'a claim' means that an asset preservation order may be made to protect all types of claims, i.e., pecuniary claims and, where appropriate, claims for specific property. There may be situations, though, where an asset preservation order will not have the effect of protecting the subject matter of proceedings, e.g., it is difficult to conceive of such an order being made in proceedings seeking a declaratory judgment on the existence of a debt. Whether or not an asset preservation order may or may not be considered to be suitable to protect specific kinds of claims will inevitably vary depending on the circumstances of the case and national law.
5. Custodial orders, under Rule 192(c), are included within the ambit of asset preservation measures, although some European jurisdictions consider them to be a separate form of order. They are included here given the functional approach taken in this Part of the Rules. Such an order, like an attachment or an asset restraining order, can properly and broadly be understood to encompass the safe-keeping and preservation of any type of property, whether physical, intangible or electronic. The term "custodian" is used to refer to any non-party (whether a court officer or otherwise) who may be authorised or instructed by the court to carry such an order in the place where the relevant assets are to be kept secure. It should be noted that technology has expanded the scope for custodial intervention, i.e., it may now apply to the safekeeping of electronic data, or to prevent passwords, metadata etc. from being altered or concealed.

Rule 193. Criteria for Awarding Asset Preservation Orders

A party seeking an order under Rule 192 must show that:
(a) **their claim for relief has a good chance of succeeding on its substantive merits, and**
(b) **it is likely that, without such an order, enforcement of a final judgment against the respondent will be impossible or exceedingly difficult.**

Comments:
1. The criteria for awarding asset preservation orders under Rule 193 are inspired by Article 7 of the EAPO Regulation and Article 17A.1 of the UNCITRAL Model Law. They are intended to protect a respondent against the injustice of being subject to an order where

there is a lack of merit in the proceedings (Rule 193(a)) or where there is no pressing need for their assets to be subject to a draconian order of this nature (Rule 193(b)).

2. The two criteria, which are widely used in most European jurisdictions, are cumulative. This means that the likelihood that the applicant will succeed on the substantive merits of the dispute should not influence the assessment of whether or not there is a real risk concerning the enforceability of a final judgment unless the order is issued by the court.
3. It should be noted that, in addition to the two cumulative criteria, a third criterion must be met and that is the requirement of proportionality under Rule 185, which requires that the measure ordered by the court should be one that imposes the least burden on the respondent and, furthermore, that the measure must not be disproportionate to the applicant's interests. This means that where the requirements under Rule 193 are met, the court may not make an attachment order or asset restraining order, if such an order imposes more than the least possible burden upon the respondent or if the order is disproportionate to the interest the applicant has applied to the court to protect.
4. The standard of proof in Rule 193(a) must be met at both without-notice (*ex parte*) and any subsequent with-notice (*inter partes*) hearings (Rule 186). When granting an attachment or asset restraining order on a without-notice (*ex parte*) basis, it is also necessary to satisfy the requirement set out in Rule 184(1), i.e., a with-notice (*inter partes*) hearing would frustrate the purpose of the order.
5. Should an order be set aside, Rules 190 and 191 impose strict liability upon the applicant.

Rule 194. Limitations on Asset Preservation Orders

Asset Preservation Orders must ensure that a respondent is not prevented from receiving financial allowances, provided the amounts are reasonable, for

(a) **ordinary living expenses, and/or**
(b) **legitimate business expenses, and/or**
(c) **to enable it to fund legal advice and representation in respect of the proceedings, including such as are necessary for it to respond to the order, including seeking its variation or discharge under Rules 186(4) or 189.**

Comments:

1. This Rule contains a number of limitations that are placed upon the scope of asset preservation orders. Without such limitations, they would be oppressive.
2. The limitation in Rule 194(a) applies only to individuals, whereas those in Rules 194(b) and (c) apply equally to individuals and legal persons or entities, the latter of which might be placed in the position of having to file for insolvency if the asset preservation order rendered them incapable of meeting their business expenses.
3. Article 31 of the EAPO Regulation contains similar provisions to those set out in this Rule. Similar provisions are also present in many European jurisdictions either as restrictions on the type of assets that can be subject to such orders, quantum limitations, or through the provision of specific financial allowances to respondents.

Rule 195. Notification of Asset Preservation Orders and their effects to Respondent

(1) At the earliest possible time after an order has been made under Rule 192, the respondent and any non-parties who are the addressees of an order must be given formal

notice of it. Where necessary to enforce the order, non-parties may be given formal notice before the respondent.

(2) The applicant may, if it wishes, inform a non-party of an order before the respondent is given formal notice.

(3) The respondent or any non-parties who are the addressees of an order made under Rule 192 must comply with it as soon as they are notified of the order. In the event of breach, they will be subject (without limitation) to the sanctions listed in Rule 191.

Sources:

ALI/Unidroit Principle 8 comment P-8C.

Comments:

1. Rule 195(1) is intended to secure a respondent's procedural rights, and particularly their right to be heard.[5] It seeks to do so without jeopardising the effective enforcement of the asset preservation order. As the approach to service and notification differs across European jurisdictions, this Rule does not specify any particular approach. Service and notice ought therefore to be effected according to Part VI of these Rules.
2. Generally, asset preservation orders concern assets over which non-parties, such as banks, have control. As such an order potentially imposes obligations on parties and non-parties, it is essential that all those who are subject to the order be notified of that fact promptly, particularly where notice is required to a non-party under the substantive law to render the order effective against them. The only exception to this notice requirement is where it would render the order ineffective, in which case notice should be given at the earliest time possible.
3. Rule 195(1) is of particular importance where asset preservation orders are applied for on a without-notice (*ex parte*) basis. It should be read consistently with Rule 186(4). As a consequence, respondents should be given notice of a without-notice (*ex parte*) order as soon as possible, which includes those situations where formal notice must be given to a non-party as a pre-condition to seeking effective enforcement of the order.
4. Rule 195(2) covers those situations where non-parties are not included within the terms of an asset preservation, yet they would nevertheless under domestic law be placed under an obligation to abide by the order. The Rule acknowledges the practical reality, especially in the context of Rules 192(a) and (b), that in certain jurisdictions the applicant will be concerned to ensure that a non-party, such as the respondent's bank, should be informed of the order's existence immediately upon it being granted by the court. This is particularly important in order to ensure that a respondent cannot evade an order by acting inconsistently with its term on the basis that it did not bind a non-party.
5. Rule 195(3) provides that an order must be complied with from the moment a respondent or any non-party is given formal notice of it under Rule 195(1). Formal notice will be effected according to Part VI of these Rules. It further clarifies that the sanctions listed in Rule 191 are not the only remedy available to an applicant in the event that a respondent or non-party that is subject to the order breaches it. As such any domestic remedies for breach, additional to those in these Rules, would be available to the court, i.e., potential civil or even criminal liability may be available in addition to the sanctions herein.

5 See, for instance the approach in Art. 17C UNCITRAL Model Law and Arts. 23-24 of the EAPO Regulation.

B. REGULATORY MEASURES

Rule 196. Measures to Perform or Refrain from Performing an Action

The court may grant the applicant a measure to regulate the relationship between parties in relation to a non-pecuniary claim for relief on a provisional basis. Such a measure may require the respondent to act or to refrain from acting in a manner specified in the court's order.

Comments:

1. Rule 196 establishes the scope of orders to perform or refrain from performing an action. It enables a court, upon application by a party, to order a respondent to act or refrain from acting in a manner specified in the order. It primarily fulfils the functions described by Rules 184(1)(c) and (d). The Rule does, however, only apply to regulatory orders in respect of non-pecuniary claims. It should be noted that asset restraining orders under Rule 192(b) may compel respondents to act or refrain from acting for the purpose of protecting any claim, including pecuniary claims.
2. The Rule enables the court to regulate the relationship between parties until such time that the decision in the proceedings is given or the case is settled otherwise. In other words, such an order supports the effective administration of justice by ensuring that steps are either not taken to frustrate the court's ability to determine proceedings on their substantive merits, or are taken to achieve the same purpose. Article 17(2)(b) of the UNCITRAL Model Law articulates a similar rule.
3. Provisional measures to perform or refrain from performing an action cover a wide range of orders, including, for instance, an obligation to perform a contractual agreement, the rectification of a media publication or to refrain from carrying out or continuing to carry out acts of unfair competition or which infringe intellectual property rights. Such measures may also cover situations of imminent harm (see particularly comment 4 to Rule 184).
4. Measures ordered under this Rule are subject to the provisions set out in Section 1 (General Part) of this Part of these Rules. It is particularly important therefore to note the application of the principle of proportionality (Rule 185) and the liability provision (Rule 190).
5. The grant of a provisional measure under this Rule is subject to the criteria of Rule 197.

Rule 197. Criteria for awarding a Regulatory Measure

A party seeking an order under Rule 196 must show:

(a) it has a good chance of succeeding in the proceedings; or

(b) where there is a significant risk that damages to the respondent will not be capable of providing adequate compensation for any interference with their rights if the proceedings are dismissed, that there is a very strong possibility that the applicant will succeed in the proceedings;
and

(c) **that the order is necessary to regulate the substantive issue or issues in dispute pending final determination of the proceedings.**

Comments:

1. This Rule sets out two cumulative conditions that must be satisfied before a provisional measure requiring a respondent to perform or to abstain from doing something, per Rule 196, can be awarded.

2. Rule 197(a) sets out the general requirement that an applicant must show that they have a good chance of succeeding in establishing their claim, or defence, in the proceedings. For instance, where an applicant seeks a restraining order in relation to intellectual property rights, a regulatory measure should only be awarded when there is a good chance that the court will ultimately decide, in its final judgment, that the respondent has infringed the applicant's intellectual property rights.
3. Rule 197(b) is intended to provide a greater degree of protection for a respondent to an application for a regulatory measure in circumstances where there is a significant risk that the damage that such a measure would cause them (e.g. loss of reputation or of perishable goods) cannot be compensated adequately. While measures that could cause damage not being compensated adequately should generally be avoided, in specific circumstances they may be necessary to avoid irreparable harm to the applicant. In those circumstances, the applicant is required to satisfy a higher standard of proof, i.e., they are required to show that there is a very strong possibility (a high chance) that their claim will succeed on its merits.
4. In addition to the criteria in Rules 197(a) and (b), an applicant must also show that the measure is necessary to regulate the matter pending the final determination of the claim (Rule 197 (c); also see Rule 188).
5. This Rule should be read together with Rule 185 on proportionality.

C. EVIDENCE PRESERVATION

Rule 198. Evidence Preservation Orders

(1) The court has the power to secure evidence on the application of a party to proceedings through the following interim measures:
  (a) hearing witness evidence or taking of witness evidence by a third party acting on its behalf;
  (b) requiring the preservation or protection of evidence by the parties or by requiring it to be placed in the custody of a custodian;
  (c) appointing an expert to provide expert opinion evidence.

(2) Evidence preservation orders may, where necessary, authorise access to the evidence. Access may be subject to such conditions as the court considers just.

Sources:

ALI/Unidroit Principles 8 and 16.

Comments:

1. Rule 198's purpose is to facilitate the preservation of a party's ability to secure evidence relevant to material issues in proceedings. Preservation of relevant and material evidence can be a critical factor both in respect of a party's (typically the claimant's) ability to prove their case, and the court's ability to establish facts accurately and decide disputes fairly. It may be necessary for a variety of reasons, e.g., to protect evidence from perishing, to protect it from being tampered with, damaged, destroyed, or hidden. It may also be necessary where a witness is unlikely to be available at trial, i.e., due to ill-health or due to the likelihood that they may not be in the jurisdiction at the relevant time.

2. While not every European jurisdiction considers evidence preservation to be a form of interim measure, the availability of similar measures that serve the same purpose and function and which are intended to preserve the integrity of the legal process is commonplace. Preservation of evidence is also, for instance, recognised as a form of provisional (or interim) measure in Article 17 of the UNCITRAL Model Law and Article 7 of the IP Enforcement Directive.
3. This Rule emphasises the fact that evidence preservation can take a variety of forms, and that courts should be ready to grant the most appropriate form of order in any particular claim. In doing so consistently with the principle of proportionality (Rule 185), they should use the form of order which will achieve its purpose in the least invasive manner for the respondent.
4. As is the case generally with provisional and protective measures evidence preservation orders may, where necessary, be ordered on a without-notice (*ex parte*) basis (see Rule 186). They may also be ordered before the applicant has initiated proceedings concerning the dispute between parties, in which case an order under Rule 188 and Rule 21(1) would ordinarily expect to be made by the court when granting an evidence preservation order.
5. The rules on evidence and access to information in Part VII also apply accordingly.

Rule 199. Criteria for awarding an Evidence Preservation Measure

A party seeking an evidence preservation order must show that:

(a) there is a real risk that unless the order is made the evidence will not be available for determining the substantive proceedings on their merits; and

(b) **if the order requires access to a party's or non-party's property the applicant has a strong *prima facie* case in respect of the merits of the applicant's claim or proposed claim for relief.**

Sources:

ALI/Unidroit Principles 8 and 16.

Comment:

1. A preservation order may be made before proceedings have commenced, i.e., where the evidence is in danger of perishing, of being destroyed, or unavailable at trial due, for instance, to a witness's imminent departure from the jurisdiction (see Rule 188).
2. Where it is necessary in the circumstances to make a preservation order urgently or where secrecy is required in order to ensure that the order is not capable of being frustrated before it has been granted, if granted, it may be granted on a without-notice (*ex parte*) basis. Examples of steps that could be taken to frustrate such an order before it is granted are: taking action to hide or destroy evidence, to remove it from the jurisdiction. Once a without-notice (*ex parte*) order has been granted, Rule 186 applies.[6]
3. Interference with a respondent party or a non-party's private property, and hence their property rights, i.e., business premises, land etc, in order to preserve evidence is a strong measure to take. Accordingly, where that is necessary an applicant must satisfy the court to a higher standard than is required for other provisional or protective measures. This enhanced standard requires the court to scrutinise merits of the applicant's substantive claim carefully. As such the court must be satisfied that the applicant has a strong *prima facie* case on the merits of the substantive proceedings or proposed proceedings.

6 See, for instance, Art. 7 of the IP Enforcement Directive.

D. INTERIM PAYMENT

Rule 200. Interim Payment Measures

A court may grant the claimant an interim payment order in relation to a monetary claim, either wholly or in part to satisfy the claim in the proceedings, in anticipation of the expected outcome.

Comments:

1. Interim payment orders are not common to all legal systems, although they exist in about half of the European Union Member States.[7] They are not, and thus should be distinguished from, orders for payment as those exist in national procedural rules and in EU law (see the EPO Regulation). Orders for payment, unlike interim payment orders, are final orders given in specific, usually one-sided, summary proceedings in relation to uncontested claims and are excluded from the scope of these Rules (see Preamble VII.3 for proceedings on payment orders). They are specifically outside the scope of Rule 184, as provisional measures are only temporary and not final orders. Furthermore, Rule 200, makes it clear that interim payments are only to be made in anticipation of the final determination of the proceedings, and hence cannot properly be final orders.
2. Interim payment orders can be regarded as a measure to prevent further harm within the meaning of Rule 184(1)(d). They are intended to either partially or wholly satisfy the claim or claims made by a claimant, on a provisional basis, in anticipation of the expected outcome in the judgment that finally determines proceedings. The often long duration of proceedings and the absence of other tailor-made procedures to protect a claimant's interest in an anticipated final determination of proceedings, including an order for payment procedure, may jeopardise the financial position of companies or individuals.
3. Interim payment orders are provisional in the sense that there is an obligation to repay the amount if proceedings, to be initiated in accordance with Rule 188, are unsuccessful.
4. In those systems where interim payment orders are allowed as a provisional measure, the grant of such an order is often subject to more stringent requirements than required for other types of provisional and protective measures, e.g., the defendant has admitted liability, judgment on liability has been obtained by a claimant with the question of damages yet to be determine[8] (see Rule 201, for the requirements applicable to the grant of such an order under Rule 200).
5. The present Rule is not intended to suggest that interim payment orders ought to be introduced into national procedural rules. It aims to provide model criteria for this type of measures considering the interests of applicants and respondents, should they be available.

Rule 201. Criteria for awarding an Interim Payment

(1) An applicant seeking an order under Rule 200 must show that:

(a) the defendant has admitted that they are liable to pay a monetary sum to the applicant, or the applicant has obtained a final judgment on liability, or it is highly likely that the applicant will obtain at least the amount sought in a final judgment; and

(b) they are in urgent need of payment by the defendant.

7 Also see Storme Report, Arts. 10.1.2. and 10.1.3.

8 See, for instance, Rule 25.7 of the English CPR.

(2) In assessing whether to make an interim payment order the court should consider all the circumstances, including any potential or actual hardship to the applicant or the respondent as a result of refusing or granting the order.

(3) An interim payment order cannot be made on a without-notice basis.

(4) Where judgment in the proceedings is for a lesser amount than that paid, any over-payment must be repaid.

(5) An interim payment order will ordinarily be made subject to the applicant giving security. If the applicant's claim is absolutely well founded and the requirement to obtain security would frustrate the order's purpose of securing urgent relief for the applicant's economic distress, where that has been at least partially caused by the defendant's delay, the court may grant an interim payment order without or upon reduced security.

Comments:

1. Two criteria must be satisfied before an interim payment measure is ordered under Rule 200. First, the defendant must have either admitted liability to pay, judgment on liability against the defendant has been entered, or it is highly likely that the applicant will succeed on the merits at trial. Secondly, the applicant can establish that payment from the defendant is needed urgently. These requirements are intended to ensure, as far as possible, that the grant of an interim payment in anticipation of a final judgment is justified.
2. The need to show urgency, in Rule 201(1)(b) is common to those European jurisdictions that permit the making of interim payments. In assessing this requirement the court may take into account how long it would take to obtain a final judgment, what the applicant's financial needs are, and whether the applicant has made serious and expeditious efforts to otherwise obtain payment from the defendant.
3. Rule 201(2) requires the court to take account of both the applicant's and defendant's interests in deciding whether to grant an interim payment. This assessment must also be read in conjunction with Rule 185 on proportionality.
4. Rule 201(3) provides an exception to Rule 186. While other provisional and protective measures may need to be awarded on a without-notice (*ex parte*) basis on the basis of urgency or the need for secrecy, such circumstances do not apply to interim payments. Due to the close relationship such measures have with the substantive proceedings, and given the anticipatory nature of this measure, applications under Rule 201 must be on-notice to enable the defendant to be heard.
5. To protect the defendant's interests, Rule 201(4) requires over-payment made to be repaid by the applicant. This is consistent with Rule 190 on liability, but extends to the situation where part of the interim payment granted is ultimately awarded in a final judgment.
6. While Rule 187(2) provides that the grant of a provisional or protective measure may be subject to the provision of security by the applicant, Rule 201(5) provides that an interim payment measure will ordinarily be made subject to giving security. This protects against any risk that repayment may be necessary. In cases, however, where a defendant has admitted liability such security may not be appropriate. This rule is inconsistent with Van Uden v. Deco-Line,[9] where the European Court of Justice required, in the context of international jurisdiction, in favour of a court not having jurisdiction on the substance that

9 Judgment of 17 November 1998, Van Uden Maritime / Kommandit-gesellschaft in Firma Deco-Line and others (C-391/95, ECR 1998 p. I-7091) ECLI:EU:C:1998:543.

'repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim'.

SECTION 3 – CROSS BORDER ISSUES

Rule 202. International jurisdiction

(1) Within the scope of the European Union Regulations or international conventions, the international jurisdiction of the court in relation to provisional and protective measures is governed by those Regulations or conventions.

(2) In any event, the court having jurisdiction in respect of the proceedings will have jurisdiction to grant provisional and protective measures.

(3) Without prejudice to applicable European Union rules and international conventions, another court may grant such provisional and protective measures necessary to protect interests located within the jurisdiction or the subject-matter of which have a real connecting link with the territory of the court, or that are necessary to support proceedings brought in another country.

Sources:

ALI/Unidroit Principle 2.3.

Comments:

1. Rule 202(1) is primarily concerned with existing rules dealing with international jurisdiction. Within the EU, many cases will be within the scope of the Brussels Ibis Regulation (see Articles 1, 4 and 6 of the Brussels Ibis Regulation). In line with Article 35 of that Regulation, as interpreted by the European Court of Justice and particularly the Van Uden v. Deco-Line ruling (Case C-391/95), a court that has jurisdiction in respect of the substantive proceedings is also able to grant provisional and protective measures. Where a court does not have jurisdiction regarding the substantive proceedings, a real connecting link must exist between the subject-matter of the measure and the territory of that court.
2. The general requirement of the 'real connecting link' should be understood to be the place where the respondent's assets are located or will be located (e.g., debts due to the respondent from third parties). Other EU rules on international jurisdiction and provisional measures include Article 6 of the EAPO Regulation and Article 20 of the Brussels IIbis Regulation.
3. In relation to interim payments, the European Court of Justice requires that, first, repayment to the respondent of the sum awarded is guaranteed if the applicant is unsuccessful as regards the substantive proceedings and, secondly, the measure sought only relates to specific assets of the respondent that are located or are to be located within the territorial jurisdiction of the court to which application is made. While the first point can be considered primarily to be an aspect inherent in the nature of a provisional measure, the second can be considered a jurisdiction rule.
4. Rule 202(2) states the rule common to international jurisdiction regimes, including the EU rules, that the court having jurisdiction over the substantive proceedings is also able to grant provisional and protective measures. There is no requirement that such proceedings have already been brought, as is apparent from Rule 188. The court that has jurisdiction over the substantive proceedings is the 'natural' forum for granting provisional and protective measures. This rule also (implicitly) forms part of ALI/Unidroit Principle 2.3 and in Principle 16 of the Helsinki Principles.

5. In accordance with international jurisdiction regimes, including the EU rules, a court may have jurisdiction to grant a provisional and protective measure where it does not have jurisdiction over the substantive proceedings, i.e., the merits of the dispute. This rule is set out in in Article 35 of the Brussels Ibis Regulation amongst others. It is also included in ALI/Unidroit Principle 2.3 and in Principle 17 of the Helsinki Principles. However, a court will only have jurisdiction in these circumstances where local interests need protection (e.g., evidence, assets, or perishable goods are located in that jurisdiction), where there is an otherwise close connection between the measures sought and that jurisdiction (e.g., a restraining order relating to acts taking place in that jurisdiction), or where the measures are necessary to support substantive proceedings brought in another country. It is for the applicant to show that one of these situations exists.
6. There are currently few international conventions on international jurisdiction, but incidental special or bilateral conventions may include relevant rules that would fall within this Rule's scope of application. According to Article 7 of the HCCH 2005 Choice of Court Convention it does not govern interim protective measures.

Rule 203. Recognition and enforcement

(1) Within the scope of European Union Regulations or international conventions, the recognition and enforcement of provisional and protective measures are governed by those Regulations or conventions.

(2) Where no European Union Regulation or international convention applies, provisional and protective measures will be recognised and enforced in accordance with domestic law.

(3) Courts should, at the request of the parties, take into account provisional and protective measures granted in another country and, where appropriate, and in accordance with these Rules, cooperate in order to secure the effectiveness of those measures.

Sources:

ALI/Unidroit Principles 30 and 31.

Comments:

1. This Rule is intended to be consistent with Rule 202(1). Accordingly, it refers to existing systems of recognition and enforcement of judgments, including provisional and protective measures. Particular reference should be made to Article 2(a) of the Brussels Ibis Regulation, according to which provisional and protective measures are recognised and enforced according to its provisions where: (i) the measure was ordered by a court that has jurisdiction in respect of the substantive proceedings; and (ii) the defendant was either heard or served prior to enforcement.
2. Special conventions and bilateral conventions may include relevant provisions for the recognition and enforcement of provisional and protective measures. For instance, Article 31(3) of the CMR[10] is generally understood to cover the enforcement of provisional measures. Provisional and protective measures are, however, generally excluded from the HCCH Conventions; see Article 7 of the HCCH 2005 Choice of Court Convention, Article

10 Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva 1956).

3(1)(b) of the HCCH 2019 Judgments Convention and Article 1(3) of the HCCH 1970 Evidence Convention.

3. Outside the scope of EU Regulations and international conventions, domestic rules will apply (Rule 203(1)). Domestic rules may also be relevant where an international convention applies in dual systems, such as in Scandinavian countries, or to implement specific rules of the convention that are left to national law. National law diverges on the recognition and enforcement of foreign judgments in general. In so far as the enforcement of provisional measures is concerned, the finality requirement may limit or prevent enforcement, as is for instance the case in England, Italy, and numerous other countries.
4. In addition, the general exceptions included in international and domestic recognition and enforcement regimes apply, notably the public policy exception and the right to fair trial. The procedural requirements included in the present Rules are intended to provide guidance in respect of such matters.
5. In respect of both Rule 203(1) and (2), the court is, at the least, required to take account of provisional and protective measures granted in another country in consequence of, and in order to further, international judicial co-operation. This may require recognition of such measures (Rule 203(2)). Where appropriate courts should also co-operate in order to enable provisional and protective measures ordered in other countries to be effective. It should be noted that Rule 203(2) is consistent with both ALI/Unidroit Principles 30 and 31 and Principles 18-20 of the Helsinki Principles.